



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 23, 1995

Mr. David A. Anderson
Chief Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR95-452

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30750.

The Texas Education Agency (the "TEA") received an open records request for certain records pertaining to a complaint filed with the TEA regarding the Masonic Home and School of Texas (the "school") in Fort Worth. Specifically, the requestor seeks, among other things, the following records:

A copy of the written anonymous¹ complaint of abuse made to TEA about the school that TEA then faxed to Child Protective Services in Fort Worth;

Other complaints made to TEA in the last 8 years about the school, including the subsequent signed complaint that is similar to the anonymous complaint;

Documents such as letters and/or memos relating to TEA's recent review of the school's special education program.

¹The individual who wrote this complaint has withdrawn his request for anonymity and has filed suit against the school for wrongful termination.

You contend that these records are excepted from required public disclosure.

Because the first and second requested items listed above contain similar information, and because you raise the same exceptions for these two sets of documents, we will discuss these two categories of documents together.

You contend that the initial complaint filed against the school and a subsequent complaint from the same individual come under the protection of the "litigation exception," section 552.103(a) of the Government Code, because

TEA has concern about being named in potential litigation concerning the allegations because they are so explosive. Serious concerns about revealing the allegations have already been voiced to TEA by the management of the [school].

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 (and authorities cited therein). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* In this instance you have not shown that the requested material meets these tests; consequently the TEA may not withhold the two complaint letters pursuant to section 552.103(a).

You also contend that portions of the complaint letters come under the protection of sections 552.026² and 552.114 of the Government Code. However, because we have determined that the information with which you are concerned must be withheld on other grounds, we need not determine the applicability of these exceptions in this instance. Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 (1982) at 1, we will raise section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Gov't Code § 552.352.

²Section 552.026 of the Government Code provides protection for information deemed confidential under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Based on information in the records before us, it is not clear to this office that the school receives federal funds so as to bring it within the confidentiality provisions of FERPA. *See id.* § 1232g(b)(1).

Section 552.101 protects information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects individuals' privacy interests if the information pertaining to those individuals is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Id.* at 683-85. However, like the privacy interests protected by sections 552.026 and 552.114, information must be withheld from required public disclosure under common-law privacy only to the extent necessary to avoid personally identifying a particular individual. Open Records Decision No. 594 (1991). We have marked the portions of the submitted documents that tend to identify particular individuals whose privacy interests are implicated therein; the TEA must withhold this identifying information. All of the remaining information in these documents must be released.

Finally, we address whether section 552.111 of the Government Code excepts from disclosure the memoranda, notes, and drafts of correspondence. We note that you did not raise section 552.111 with regard to these records in your initial correspondence to this office, but rather claimed this exception for the first time on December 22, 1994. In Open Records Decision No. 515 (1988) at 6, this office held as follows:

When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. City of Houston v. Houston Chronicle Pub. Co., 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest in withholding the information to overcome this presumption. Open Records Decision No. 319. *For this reason, a governmental body must show compelling reasons why this office should consider additional arguments, raised long after 10 days have elapsed, for withholding requested information.* [Emphasis added.]

In this instance you did not raise section 552.111 within the ten-day time period following the agency's receipt of the open records request. Consequently, the TEA has waived the protection of this "permissive" exception to required disclosure. Because you have raised no other applicable exception with regard to these records, the memoranda, notes, and drafts are presumed public information and must be released except for information noted above, unless you present to this office compelling reasons as to why these records should not be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/RWP/rho

Ref.: ID# 30750

Enclosures: Marked documents

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(w/o enclosures)